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Issue Date: 16 October 2006

Case No. 2005-STA-44

In the Matter of
RICK JACKSON,
Complainant

v.

SMEDEMA TRUCKING, INC.,
Respondent

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the Surface Transportation Assistance Act of 1982 ("STAA" or the "Act"), as amended by 49 U.S.C Section 31105 and the Regulations found at 29 C.F.R. Part 1978. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

The proceedings before the Office of Administrative Law Judges ("OALJ") were initiated on May 9, 2005, when Rick Jackson (hereinafter "Complainant" or "Jackson") filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration ("OSHA"). Jackson alleged that Smedema Trucking, Inc. (hereinafter "Smedema" or "Respondent") discriminated against him in violation of the Act. In part, Complainant alleges that Smedema discriminated (retaliated) against him for filing a prior claim against it, in which it terminated him for engaging in other protected activity under the Act. (RX 4,5; CX 3, Exhibit C).

Following an investigation of this matter, the Secretary of Labor served its Findings and Order on June 3, 2005, denying relief. On June 12, 2005, Complainant appealed that finding to this office. The formal hearing was initially set for March 7, 2006, in Madison, Wisconsin, but due to a scheduling conflict, the hearing was rescheduled to commence on June 6, 2006. However, on February 13, 2006, Respondent filed a motion for summary decision requesting that this matter be dismissed. By order dated May 23, 2006, the undersigned administrative law judge postponed the June 2006 hearing and established a submission schedule for evidence in support of and in defense of Respondent's outstanding motion.

Undisputed Material Facts

By virtue of the settlement agreement in the prior case, Complainant was reinstated to his former position as a company truck driver by Smedema on April 4, 2005.[1] His first assignment was to make daily runs between Fox Lake, Wisconsin and Chicago, Illinois. (CX 3, Exhibit B). At that time, Smedema employed nineteen company drivers and twelve owner-operator drivers, of which it is not clear whether he was the nineteenth or twentieth company driver. (CX 3, Exhibit C).

Upon reinstatement, Randall Smedema spoke to Complainant about how to fill out his driving logs. This was in part based upon issues that had arisen while employed there before his first complaint was filed. (CX 3, Exhibit B).[2] Complainant also testified that, "Randy [Smedema] told me if I was going to be working for him I had to make my deliveries on time" to which Jackson added, "and he implied I would have to juggle my times if I was expected to get miles from him." (CX 3, Exhibit B).[3]

After only eight days of work, on April 13, 2005, Mr. Smedema spoke to Complainant (CX 3, Exhibit A) and told him that they had decided to take him off the Chicago run, and would be using him on the run to either Baton Rouge, Louisiana or Jackson, Mississippi. (CX 3).[4] (At that time, Smedema had three or four of the operators driving the same route as Complainant (CX 3, Exhibit B) and thus had a basis for comparison of Jackson's times with the others.).[5]

[1] Again, this reinstatement was the result of a settlement agreement, signed by the parties on April 4, 2005. (RX 1, Exhibit 1) (CX 3, Exhibit C).

[2] Several of Complainant's interrogatories and much of his deposition referred to in the motion for summary decision documents, focused on a review of the facts and issues surrounding Complainant's termination and reinstatement involved in his prior complaint in *Jackson v. Smedema, supra*. The facts surrounding the prior complaint are not relevant to the primary issue of the instant motion for summary dismissal, except for the fact that Complainant filed the original complaint; Respondent reinstated Complainant on April 4, 2005 in Randolph, Wisconsin to serve as an over-the-road truck driver, thus settling the prior matter, and the fact that Complainant was terminated, again, within fourteen days of the filing of his original complaint, and nine days of the signing of the settlement agreement and reinstatement related thereto. (CX 3, Exhibit B).

[3] While Respondent denies that any such implication was ever made, (CX 3, Exhibit B) I find that the additional argument and unsupported allegations contained in the admissions made by Mr. Jackson, in describing his log falsification motivation, are not relevant to those log falsification admissions. Whether Mr. Smedema made such statements or not, the requirement that Complainant make his deliveries on time, or even that there was an implication that he "juggle his times" (which is not necessarily so), does not warrant a conclusion that he was being directed to either engage in a wholesale falsification of his logs, or that he even occasionally falsify his logs.

[4] Complainant's May 14th letter alleges that this exhibit is an admission by Respondent that it was told by Jackson that it was in "direct violation of the agreement by severely limiting his income by going out of Smedema's way to find the worse (sic.) possible assignment for Rick Jackson hoping Rick Jackson would quit." (CX 3). A review of this exhibit reveals no such admission, and, again demonstrates its irrelevancy to the issue raised in Respondent's motion.

[5] Since other employees worked the same route as Jackson during the eight days Jackson was employed by Smedema, Respondent verified that forty-two similar routes were run, with twenty-two performed by owner-operators and twenty by company drivers. (CX 3, Exhibit C). Claimant, however, maintained that this statement by Respondent was totally false. (CX 3, Exhibit C). Regardless of which position might turn out to be credited on this and other allegations, or the accuracy of them, none of the disputed facts contradict the basic material fact related to Mr. Jackson's repeated admissions that he falsified the logs, regardless of his reasons for so doing.

During this conversation about taking on a longer route, Jackson admitted that he was unable to confirm his arrival and departure times on the Chicago trips stating, "I falsified my log entries…," and confirmed: "It's a bogus log no matter how you look at it." (CX 3, Exhibit B). He stated that he falsified his logs, "to show that the constant dispatch back and forth from Chicago was illegal." (CX 3). This made employer aware of the log falsifications, but Complainant was not fired on the spot. (CX 3). Jackson asserted to Smedema that he could not legally make the round trip to Chicago on a daily basis, and that Smedema was in violation of the terms of the settlement agreement because he had not made a "valid or good faith arrangement to correct the problems he had made previously [in the prior case]. Therefore … the agreement was void due to the fact that he [Smedema] did not honor his part of the bargain … [because Jackson was told when hired that he] … would be running quite a few miles (3,000 /week) or better." (CX 3, Exhibit B).

On April 15, 2005, Complainant was terminated for admitting that he turned in the log falsifications and making the false reports. (CX 3, Exhibit B & C).

On April 19, 2006, Mr. Jackson filed the present complaint with OSHA. It was filed together with another complaint, as two separate complaints, both of which were apparently related to his "blacklisting" allegations. The first claim named SNE Transportation Co., Inc., and the second named the present Respondent, Smedema Trucking, Inc., and its counsel. (CX 2, Exhibit A). In the Smedema Trucking complaint, Jackson alleged that, "Randy tried to get me to quit by sending me on these short trips and he was trying to get me irritated for the purpose of getting me angry and I'd tell you to take the job and shove it." (CX 3, Exhibit B). Respondent, of course, denies these allegations. (CX 3, Exhibit C). Complainant further alleges that Respondent did not assign Complainant enough miles, and that Complainant was assigned the Chicago route in retaliation for his previous complaint against Respondent, both of which he alleged as actions designed to force him to quit [*i.e.*, a constructive discharge] (CX 1), an allegation which was also denied by Respondent. (CX 3, Exhibit C).[6]

Responding to other counter-allegations of the Complainant, Respondent admitted that while it had not terminated or issued a written warning to any employee in the previous two years for inaccurate logs, it specifically warned Jackson about his log inaccuracies which had occurred before his first termination.[7] (CX 3, Exhibit C). Furthermore, Complainant argued that Respondent had previously been cited by the Federal Motor Carriers Safety Administration for

[6] With regard to the SNE Transportation Co. Inc. complaint, after leaving Smedema, Jackson went to work there in Mosinee, Wisconsin, as an over-the-road truck driver. (CX 3, Exhibit E). Records show that he began working for SNE on November 9, 2005, but due to a shoulder problem he actually reported on November 18, 2005, after which he did not return to work at all. (CX 3, Exhibit F). On November 30, 2005, after he was released to return to work by the physician, SNE Transportation sent him a termination letter, stating that Jackson had falsified his employment application, by leaving three of his previous employers off from it, including that with Smedema. (CX 3, Exhibit F). He alleged retaliation by Smedema's blacklisting of him, and SNE's participation in the blacklisting. He admitted that he did so, in part, because "any one of them could knock me out of the job and give me a bad reference." (CX 3, Exhibit F). Again, I find that Jackson's SNE Transportation history and complaint has no relevance or standing as a material fact related to the issues raised in Respondent's present motion. If anything, it indicates a total lack of conscious concerning Mr. Jackson's view of honesty in reporting obligated information, beyond his employment at Smedema.

[7] These inaccuracies occurred during his first stretch of employment from March 16, 2005 to March 28, 2005.

various violations for hours of service, equipment violations, and improper records. (CX 3, Exhibit C).

Subsequent to his termination, Jackson revealed that he intended to send falsified logs to the Department of Transportation in the event that the case did not go his way so Smedema would be fined. (Exhibit B). He stated: "[T]here's no hoping about it [his desire to send off the logs]… I did this before to half a dozen other, six or seven, could be eight different companies they did audits, and each and every time I sent documentation and they did an audit, and they found the employer to be in non-compliance." (Jackson Depo., Exhibit B).

Respondent's Allegations

Respondent alleges that the "Driver's Handbook" provides general guidelines for mistakes on log books, but in Mr. Jackson's case, his falsification was considered an act of willful and intentional misconduct that merited Jackson's termination. (CX 3, Exhibit C).

Outstanding Motions and Requests

Complainant's June 3, 2006 letter includes a request that the undersigned not consider any portions of the deposition transcript relied on by Respondent because they are untimely and do not conform to the rules of evidence. (CX 4). Also, this letter requests that the undersigned consider whether the evidence supports a summary decision in support of Complainant. (CX 4).

In Complainant's May 12, 2006 response to Respondent's motion for summary decision, he requested additional time for OSHA and Respondent's counsel to respond to his blacklisting allegations. (CX 2). In his second response, on May 16, 2006, he moved the undersigned to allow him to amend the pleading to include his additional claims against SNE Transportation, Edward Corcoran, and Smedema; that these cases be consolidated; and that he be granted several months to conduct discovery and prepare his cases. (CX 3). On June 3, 2006, Jackson again requested that his cases be consolidated and additional discovery time be granted due to the fact that the OSHA investigator refused to mention in an investigation report that counsel for respondent spoke to Eagle Logistics. (CX 4). However, on June 16, 2006, Complainant submitted a letter addressed to the Chief Administrative Law Judge requesting that his complaints against SNE Transportation Co., Inc. (5-0170-06) and Smedema trucking, Inc, and Edward A. Corcoran (5-2780-06-009) be consolidated. (CX 5). This letter does not mention the instant complaint against Smedema, but instead, appears to be a request for an appeal and consolidation of the two OSHA denials of Jackson's subsequent complaints.

These positions and motions are deemed irrelevant to the question of whether a genuine issue of material fact exists upon which a denial of Respondent's motion for summary dismissal may be based. The willful and intentional falsification of Mr. Jackson's logbooks, and its admission by him, is deemed to be of sufficient overall concern as to warrant favorable consideration as a legitimate business explanation proffered to justify his termination from Smedema Trucking. Therefore, all other outstanding motions and requests will be considered denied.

DISCUSSION AND APPLICABLE LAW

Standard for Summary Decision:

Summary judgment (summary decision as applied to administrative law) is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317,322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir.1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and ... draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 964 (7th Cir.1998). *See also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also LINC Fin. Corp*, 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505, 91 L.Ed.2d 202, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252. Therefore, if the court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial," ' and summary judgment must be granted. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 289 (1968)).

The standard for granting summary decision in whistleblower cases is analogous to the rules governing summary judgment under the Federal Rules of Civil Procedure. *See Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-52, slip. op. at 1 (ARB Dec. 13, 2002); Fed.R.Civ.P. 56(e). Summary decision is appropriate for either party where the record shows that "there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *Celotex Corp.,* 477 U.S. at 322. A material fact is one that might affect the outcome of the suit, and a genuine dispute is one where a reasonable jury could find for the nonmovant based on the evidence. *Anderson,* 477 U.S. at 247. The opposing party may not rest upon the mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c). All evidence and factual inferences are viewed in a light most favorable to the nonmovant. *Matsushita Elec.,* 475 U.S. at 587; s*ee also Williams v. Lockheed Martin Corp.,* ARB NOS. 99-54 & 99-064, OALJ No. 1998-ERA-40, 42 (Sept. 29, 2000).

Analysis:

Since Complainant's employment was within the State of Wisconsin**,** this case is controlled by the law of the United States Court of Appeals for the Seventh Circuit.

In order to prevail under the STAA, Jackson must first establish that he engaged in protected activity. The employee protection provisions of the STAA are set forth at 49 U.S.C. § 31105. The relevant part of this Section provides that:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because -
> (A) the employee, or another person at the employee's request, has filed any complaint or begun a proceeding relating to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refuses to operate a vehicle because[8]-
>
> > (i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or,
> > (ii) the employee has a reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. [9]

49 U.S.C. § 31105(a).

A number of Circuit Courts across the country have applied the Supreme Court's *McDonnell Douglas* burdens of proof and production originally created to address actions arising under the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.,* to whistleblower retaliation claims brought under various acts. *See, e.g., Hudson v. Chicago Transit Authority* 375 F.3d 552 (7th Cir. 2004); *Stutler v. Illinois Department of Corrections,* 263 F.3d 698 (7th Cir. 2001); *Kahn v. United States Sec'y of Labor*, 64 F.3d 271 (7th Cir 1995); *Doyle v. United States Sec'y of Labor,* 285 F.3d 243 (3rd Cir. 2002); *Bechtel Constr Co. v. United States Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995); *Couty v. Dole,* 886 F2d 147 (8th Cir. 1989); *Consolidated Edison Co. of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982).

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[8] Section 31105(a)(1)(B) is commonly referred to as the "refusal to drive" clause. "The STAA's 'refusal to drive' clause provides two categories of circumstances in which an employee's refusal to drive will be protected thereunder, referred to as the 'actual violation' and 'reasonable apprehension of serious injury' categories, found at 49 U.S.C. §31105(a)(1)(B)(i) and (B)(ii), respectively." *Schulman v. Clean Harbors Environmental Services, Inc*., ARB No. 99-015, ALJ No. 1998-STA-24, slip. op. at 7 (ARB Oct. 18, 1999).

[9] An STAA complaint under 49 U.S.C. Section 31105(a)(1)(B)(i) requires that a complainant show an actual violation of a commercial motor vehicle safety regulation; it is not sufficient that the driver has a reasonable good faith belief about a violation. *Id.*; *Cook v. Kidimula International, Inc*., 95-STA- 44 (Sec'y Mar. 12, 1996). Jackson has made no allegations specifically under this section. He has not alleged any refusal to drive, even though he may have, if "inartfully" alleged the raising of "health and safety" issues in his complaints about driving times to Chicago, and related those to the maintenance of his logbooks. These, however, are chargeable only under the provisions of Section 31105(a)(1)(A), "begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order," provision of the Act. Any allegation concerning Mr. Jackson's resistance to the driving time and distances that he sought to correct by falsifying his logbooks, without a refusal to drive related to it, would have to be justified under the (A) provision.

Some Circuit Courts have applied the *McDonnell Douglas* test specifically to STAA whistleblower claims as defined by the above statute. *See, e.g., Calmat Co. v. United States Department of Labor,* 362 F.3d 1117 (9th Cir. 2004); *Yellow Freight System, Inc v. Sec'y of Labor,* 27 F.3d 1133 (6th Cir. 2004); *Moon v. Transport Drivers, Inc.,* 836 F.2d 226 (6th Cir. 1987). Such a test is appropriate here.

In the Seventh Circuit, if a complainant "does not have direct evidence of retaliation to defeat a motion for summary judgment, he can proceed under the indirect, burden-shifting method of proof." *Stutler,* 263 F.3d at 702 (external citations omitted).

> Under that method, the plaintiff must first establish a prima facie case. After doing so, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. If the employer carries this burden, the plaintiff must produce evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory--in this case, done in retaliation for [Jackson]'s engaging in protected conduct. "Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"

Id., (internal and external citations omitted).

To establish a *prima facie* case of discriminatory treatment under the STAA, Jackson must prove: (1) that he engaged in an activity protected under the STAA; (2) that the employer was aware of the protected activity; (3) that he was the subject of an adverse employment action; and (4) that a causal link exists between his protected activity and the adverse action of his employer. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Stutler,* 263 F.3d at 702; *Kahn,* 64 F.3d at 278; *Safley v. Stanndard, Inc.,* ARB No. 05-113, ALJ No. 2003-STA-54, slip op at 4-5 (ARB Sept. 30, 2005). At a minimum, Jackson must present evidence sufficient to raise an inference of causation. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). Once a prima facie case is established which raises an inference that protected activity was the likely reason for the adverse action, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *Stutler,* 263 F.3d at 702. If successful, the plaintiff then bears the ultimate burden of demonstrative by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. *Id.*

Protected Activity

In the present complaint, Jackson proposes that he had engaged in protected activity when he raised issues concerning the driving times to and from Chicago, and that he had to falsify his log books in order to have the time and miles traveled from Wisconsin, and on other trips between April 4, 2005 and April 15, 2005, the date of his termination. Complainant also asserts the filing of his first complaint on April 1, 2005 constitutes protected activity – and his current termination on April 15, 2005 was also in retaliation for engaging in that activity.

Jackson asserts that his falsification of the logs constitutes a protected activity under the STAA. However, he has offered no legal reasoning as to why intentionally falsifying a log book would constitute protected activity. I believe that his intent is to state that he could only show that the trip was impossible to make in the time required by his employer by falsifying his logs. However, quite the opposite is true. If it was his intent to show the time required by the trip was impossible, he would have been better off to show the actual time it took him to make the trip. Then, he could demonstrate the trip could not be made in the time required. There is no logical reason why an individual would want to falsify their logs to show the truth. Further, Complainant has offered no other evidence, such as other truckers log books, to show that the trip cannot be made in the time required by the Employer. As such, Complainant's falsification of his logs does not constitute protected activity.

In addition, Jackson argues that the matters involved in the original complaint related to alleged protected activity. He alleged in the present complaint: "The facts in the previous complaint are relevant as well as the facts in this second complaint." (RX 1, Attch. E). This would provide a basis for the protected activity allegation in the present complaint, thus obligating the undersigned to review that alleged protected activity in this case. He alleges that Respondent did not honor the conditions that he sought to be rectified in settlement of the first complaint; that Respondent entered into that settlement in bad faith by intending to force his termination by paying him a low wage after his return, and by refusing to pay him $2,800.00 in "stop pay." (*Id*.)

Here, the record establishes that Jackson was initially hired by Smedema on March 16, 2005; that he was terminated on March 28, 2005; that he filed his first Complainant on April 1, 2005; that the matter was settled by virtue of a settlement agreement entered into by the parties on April 4, 2005, and that he was reinstated pursuant to that agreement on April 4, 2005. It is undisputed that Complainant filed a complaint against the Respondent on April 1, 2005. While this matter was settled and the claim withdrawn four days later, the proximity between the first complaint filed on April 1, 2005 and the second discharge on April 15, 2005 is too close not to create an inference of protected activity. Thus, while Complainant has established a prima facie showing of some protected activity, this does not include his log falsifications.

Employer's Knowledge; Adverse Action; and Casual link

As the first complaint was formally filed against the Respondent, and the matter was settled, it is clear the Respondent knew of the protected activity. Further, as Complainant was fired, this would constitute an adverse employment action. Given the lack of time between the filing of the initial complaint and the adverse action taken against the Complainant, one can not help but suspect a casual link between the protected activity and the adverse employment action.[10] Thus, I will assume that Complainant has established a prima facie case for purposes of summary decision.[11]

[10] As seen when the facts are viewed in a light most favorable to the Complainant.

[11] As Complainant is pro se, I feel the need to explain the following: Establishing a prima facie case merely means that only when the facts are *examined in a light most favorable to the Complainant* that a basis for a claim has been established. This does not establish the elements for the purposes of an award, or to the standard required at a trial.

Legitimate Business Reason for Employee's Termination

Now that a prima facie case has been established, the Respondent must now articulate a legitimate business reason for firing Complainant. Helpful to the present matter is a determination by the Sixth Circuit in *Moon v. Transport Drivers, supra,* affirming a finding by the Administrative Law Judge in a similar STAA action. In it, the driver (Moon) alleged that he was terminated for noting alleged safety defects in the trucks that he drove. The employer stated he was terminated for making a number of inaccurate entries in his log book. Moon had received two prior warnings concerning log inaccuracies and his logbooks had been criticized at driver's meetings, including warnings about future violations of Department of Transportation (DOT) regulations regarding his logbook entries. In reviewing the judge's decision, the Secretary of Labor agreed with the Administrative Law Judge, and ruled that despite having established a *prima facie* case*,* Transport Drivers "had articulated a legitimate non-discriminatory reason for discharging [Moon] – falsification of logs – and … ha[d] not shown by a preponderance of the evidence that that reason [was] pretextual, or … that [it] was motivated at least in part by discriminatory intent." *Id*. at 228.

Unlike the present case, in which Jackson not only admitted the cited inaccuracies, but branded them as "bogus" himself, in *Moon v. Transport Drivers, supra,* Moon maintained that his logbook entries were accurate, a fact that was rejected by the Sixth Circuit when it ruled that "Moon had failed to offer sufficient evidence that the logs were accurate." *Id*. at 230. The record is clear in the instant case that upon being rehired as part of the settlement agreement of the first complaint, Respondent specifically warned Jackson about inaccuracies surrounding his log entries. When approached by Respondent about subsequent inaccuracies since his rehiring, Jackson's admission of the deliberate "bogus" logbook entries shows that not only were the logs inaccurate, they were deliberately falsified. Unlike the case in *Moon* where the court found inaccurate logs, if even unintentional, to be a legitimate purpose for the adverse employment action, here we have a case of deliberate falsification. Jackson's intentional falsification took place after warnings were given to him concerning previous log entries. Therefore, under the reasoning articulated in *Moon*, such an action by an employer constitutes a legitimate non-discriminatory reason for discharging the Complainant.

Legitimate Business Reason for Termination as Pre-Textual

As a legitimate reason has been articulated by the Respondent for the adverse employment action, Complainant now bears the burden of showing that such action was in fact pre-textual. Here, the Complainant has offered no evidence of rebuttal.[12] One could argue that the filing of the initial complaint was reason enough to create a "pre-text" for firing Complainant. However, the facts demonstrate that Complainant was previously fired before filing the initial complaint. Had Respondent wanted Complainant gone, they could simply not have re-hired him. But, Complainant could argue that they only rehired him in order to find a "pre-textual" reason for firing him again. If this were the case, Respondent could simply have argued under *Moon* that the log inaccuracies were a legitimate business reason for Complainant's original termination on March 28, 2005. They did not do this. Respondent in fact warned Complainant about his log inaccuracies upon rehiring him. However, Complainant chose to

[12] Given that the Claimant is pro se, I shall attempt to make all inferences from the facts on his behalf.

intentionally falsify his logs for the purpose of blackmailing Respondent.[13] Firing Jackson for intentionally falsifying his logs is clearly not a pre-text for punishing him for engaging in protected activity, even when the facts are examined in a light most favorable to Jackson.

Conclusion:

Here, there is clearly no genuine issue of material fact for trial. Even though Complainant has established a prima facie case under the act, Respondent has shown a legitimate business reason for Jackson's termination. This has not been shown as a pre-text for punishing protected activity. In so ruling, I have considered the material fact of both complaints and the filing of Jackson's initial complaint, together with the fact of the proximate timing of the both his prior and present discharges to the complaints that he made concerning safety, driving times, and other matters, and have determined that they do not affect the articulation of the legitimate business reason advanced by Respondent for Jackson's termination in this case – the intentional and willful falsification of Jackson's logbooks.

Sanctions:

Respondent asserts that while Jackson is *pro se*, he is certainly not inexperienced with respect to dealings with the court, and if he makes false or baseless statements to the court, "he should be held to the same standard of truthfulness and candor as any attorney appearing before [the] court." (RX 5).

Because of this, Respondent requests that I find Claimant in violation of Rule 11 of the Federal Rules of Civil Procedure and award Respondent the actual costs and attorney's fees for defending this action. Based on the record, I would have little difficulty in imposing sanctions against Jackson to the fullest extent possible. First, Jackson's accusation of retaliatory termination by Smedema Trucking is utterly baseless. Upon Jackson's return to work for Smedema Trucking on April 4, 2005, he was told to make correct driving log entries and informed that his driving log would be reviewed the following week. (Jackson Depo. at 153-155, Smedema Affidavit, Exh. 3). Smedema Trucking also supplied Jackson with a copy of the Driver's Handbook which indicated the importance of making correct driving log entries. (Jackson's Depo. at 92; Corcoran Affidavit, Exh. D). Notwithstanding these warnings, Jackson, by his own admission, falsified the entries on his driving logs beginning April 4, 2005. (Jackson Depo. at 165-166, 171-172, 178-179, 182-184; Corcoran Affidavit, Exh. B). Accordingly, on April 14, 2005, Smedema Trucking discharged Jackson because he had intentionally falsified his driving logs. (Smedema Affidavit, Exh. 1). Not only is Jackson's claim without merit, the record also compels the conclusion that Jackson's claim is a blatant attempt to abuse the legal process and reveals that the claim was brought in bad faith. Jackson admitted that "his strategy" in falsifying his driving logs was to create documentation with which to harass Smedema. (Jackson Depo. at 182-184). Jackson stated that if his retaliation claim under the STAA was dismissed, he could send the falsified logs to the Department of Transportation [DOT], hoping that the DOT would audit and fine Smedema Trucking. He claims to have used a similar

[13] As noted above, Jackson stated he intended on sending the falsified logs to the Department of Transportation in the event this case did not go his way so Smedema would be fined – as he had done to "six or seven, could be eight" different companies in the past. (Exhibit B).

coercion against other employers on six to eight previous occasions. *Id*. Jackson's scheme also shows that he planned to bring this retaliation claim even before his employment was terminated on April 14, 2005. *Id*. Furthermore, the record indicates that Jackson has filed a multitude of similar claims. He has filed five other claims under the STAA, all of which yielded findings of no probable cause. (Jackson Depo. at 10-11, 23-24, 29, 35, 36-38; Corcoran Affidavit, Exh. B). In addition, Jackson has filed six or more complaints with the Department of Transportation and forty claims of discrimination under the Wisconsin Fair Employment Law. (Jackson Depo. at 60, 182-184; Corcoran Affidavit, Exh. B). In light of the foregoing, an award of attorney's fees and costs to Smedema Trucking would be particularly appropriate. Regrettably, however, I have no authority to award Rule 11 sanctions against Claimant.

Rules of practice and procedure for the Act are set forth in 29 C.F.R. 1978 and 29 C.F.R. 18. 29 C.F.R. 1978.100. In addition, "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. 18.1. The authority of an administrative law judge is made even more dubious by 29 C.F.R. 18.29(b) "which recognizes that enforcement actions against those who misbehave in proceedings before an [administrative law judge] are to be referred to the court system." *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887 (9th Cir. 1993). This is clarified by *Somerson v. Mail Contractors of America*, where the ARB held that neither an ALJ nor the Secretary of Labor holds the authority to award attorney's fees and costs against a complainant under the STAA. *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003 STA 11 (ARB Oct. 14, 2003); s*ee also Abrams v. Roadway Express, Inc*., 1984 STA 2, slip op. at 12 (May 23, 1985) where fees were denied; and *Settle v. BWD Trucking Co. Inc.,* 92-STA-16 (Sec'y May 18, 1994) stating that a respondent is not entitled to attorney fees under the STAA. Under this law, I have no authority to grant Rule 11 sanctions, even though such a situation as this may warrant the awarding of sanctions. Therefore,

RECOMMENDED ORDER

IT IS ORDERED that Respondent Smedema Trucking, Inc.'s motion for summary dismissal is GRANTED, that Respondent Smedema Trucking, Inc.'s request for sanctions is DENIED, all other outstanding Motions and Requests are DENIED, and Rick Jackson's complaint is DISMISSED.

In view of the above, IT IS ALSO ORDERED that the formal hearing in the process of being rescheduled is hereby cancelled.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

APPENDIX A

Evidence and Documents Considered In This Order:

Complainant's June 12, 2005 appeal request (CX 1).

Complainant's May 12, 2006 response to Respondent's motion for summary decision (CX 2).

- May 11, 2006 letter from OSHA Area Director Melvin Lischefski informing Jackson that if he did not forward supporting information within 10 days, his 2006 complaints against SNE Transportation Co., Inc., Smedema, and Mr. Edward A. Corcoran, counsel for Smedema, could be jeopardized. (CX 2, Exhibit A).
- May 11, 2006 letter from Respondent's counsel denying any attempt by either he or his client to blacklist Complainant, and also denying that either has ever had any contact with SNE Transportation. (CX 2, Exhibit B).

Complainant's May 16, 2006 second response to Respondent's motion for summary decision (CX 3).[14]

- May 26, 2005 letter from Nancy Vande Streek, the office manager for Smedema, to OSHA investigator Fernstrum. (CX 3, Exhibit A).
- Complainant's unsigned, undated statement, submitted on OSHA letterhead. (CX 3, Exhibit B).
- Smedema's October 6, 2005 responses to Complainant's interrogatories. (CX 3, Exhibit C).
- Smedema's November 14, 2005 responses to Complainant's second set of interrogatories. (CX 3, Exhibit D).
- Jackson's May 16, 2006 signed statement to OSHA. (CX 3, Exhibit E).
- Jackson's second signed statement to OSHA dated May 16, 2006. (CX 3, Exhibit F).
- A $2,000 invoice from Scott L. Schroeder, S.C, listing fees owed for various legal services rendered to Jackson between April 10, 2006 and May 15, 2006. (CX 3, Exhibit G).

Complainant's June 3, 2006 response to Respondent's reply brief in support of its motion for summary decision. (CX 4).

Complainant's June 16, 2006 letter to the Chief Administrative Law Judge requesting a consolidation of claims. (CX 5).

[14] Complainant also included copies of *Jackson v. Labor and Industry Review Commission and USF Holland*, Cir. Ct. No. 2005 CV984 (Wis. App. Apr, 27, 2006) (CX 3, Exhibit H); *Jackson v. Ecklund Carriers Inc.* ERD Case No. CR200200699 (CX 3, Exhibit I); a letter from Charles Turner with the State of Wisconsin Labor and Industry Review Commission dated May 2, 2005 regarding *Jackson v. Klemm Tank Lines*, ERD Case No. CR20025060 (CX 3, Exhibit J); and what appears to be page seven of the Administrative Law Judge's decision in *Jackson v. Ecklund Carriers Inc.* ERD Case No. CR200200699 (CX 3, Exhibit K). Jackson's brief cites CX 3, Exhibits H-J as some sort of a defense for Smedema's request for Rule 11 sanctions, but it is unclear to the undersigned how these cases relate to Respondent's charges in the instant action. In addition, Complainant's brief further explains that CX 3, Exhibit K is an example of some of the evidence he would want to subpoena if the undersigned approves his motion for consolidation. While I note that Jackson submitted Exhibits CX 3, H-K, I also find that they have no relevance to the instant claim and will not factor into this summary decision.

Transcript from Respondent's deposition of Complainant on November 3, 2005. (TR 1-191).

Respondent's February 13, 2006 brief in support of its motion for summary decision. (RX 1) .

Respondent's May 26, 2006 letter to the undersigned. (RX 2).

Respondent's June 2, 2006 reply brief in support of its motion for summary decision. (RX 3).

Respondent's June 7, 2006 letter to the undersigned. (RX 4).

Respondent's June 13, 2006 letter to Complainant acknowledging transmission of a second copy of the transcript for the November 2005 deposition. (RX 5).

APPENDIX B

Other Complainant Allegations:

The following allegations of fact proposed by the Complainant as being material to the present motion are deemed to be irrelevant by the undersigned. They are therefore, not genuine issues of material fact for purposes of the determinations necessary to ultimately decide the outcome of this motion for summary dismissal. Recognizing that the Complainant in this matter is appearing *pro se*, I shall list them nonetheless:

- "Randy [Smadema] expressed some discontent about me filing a complaint and he wanted to know why I wanted to work there anyway." (CX 3, Exhibit B). This is not relevant to the log falsification issue.

- "Randy tried to get me to quit by sending me on these short trips and he was trying to get me irritated for the purpose of getting me angry and I'd tell you to take the job and shove it." (CX 3, Exhibit B). Respondent denies this allegation. (CX 3, Exhibit C). Again, this not determinative to resolution of the present motion.

- Respondent never intended to honor the settlement agreement from Complainant's previous complaint, but instead, Respondent's actions were retaliation for the first claim. (CX 1). Respondent denies this allegation. (CX 3, Exhibit C). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Complainant's salary with Respondent was far below that of a "decent average driver" of his experience. (CX 1). Respondent denies this allegation. (CX 3, Exhibit C). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Respondent has refused to pay $2,800 in stop pay which was agreed to in writing by using a "bizarre analysis to deliberately cheat me." (CX 1). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Respondent did not intend to honor the terms of the prior settlement agreement and "severely restricted" Jackson's wages "below normal or reasonable to survive due to his excessive road expenses." Smedema's retaliatory actions were part of an unsuccessful attempt to force Jackson to quit (constructive discharge). (CX 2). Respondent denies this allegation. (CX 3, Exhibit C). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Constructive discharge is commonplace in the trucking industry. (CX 2). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Counsel for Respondent contacted Complainant's current employer, SNE Transportation, and informed them about Complainant's whistleblowing activities. (CX 2); (CX 3,

Exhibit E, F). Jackson based this allegation on the fact that he was discharged from SNE Transportation shortly after his deposition in the instant case; SNE Transportation used *Jackson v. Ecklund Carriers Inc.* ERD Case No. 200200699, in their response to his unemployment claim, which is one of more than 40 of the various actions he has taken against previous employers, and it was "highly improbable" that they would have been able to identify this case without "someone providing them with this information;" and because it was "extremely odd" SNE Transportation look into the employment history included on his application after he was already hired and working for them. (CX 3, Exhibits E, F). Mr. Corcoran denies this allegation, stating that he has never attempted to blacklist Complainant and has never had any contact with SNE Transportation. (CX 3, Exhibit B). This constitutes argument and unsupported allegations and is not relevant to the log falsification issue.

- SNE admitted at an unemployment hearing that Jackson's performance was satisfactory and his logs were legal, but that Jackson was discharged by SNE Transportation for various misrepresentations on his application. (CX 2). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Dean Raasch of Eagle Logistics called Complainant and told him to drop his complaint against Smedema because counsel for Respondent had contacted Mr. Raasch. (CX 3). Jackson stated, "Mr. Edward A. Corcoran called [Raasch] and told him various things about [Jackson] that would also cause [Raasch] to not consider hiring [Jackson] back if [Jackson] were to drop [his] complaint. (CX 2). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Counsel for Respondent wanted Complainant to "remain jobless with no income including no unemployment benefits in order to prevent any possibility of hiring a lawyer." (CX 2); (CX 3, Exhibit F). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Counsel for Respondent's refusal to give Complainant a copy of the deposition transcript is simply an attempt to "buy more time." (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- OSHA investigator Calvin Fernstrum will be issuing a no probable cause finding in what are apparently the 2006 claims against SNE Transportation, Smedema, and Mr. Corcoran. (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Counsel for Respondent is requiring Complainant to prove his claim, and he has admitted that he will contact "any and all [of Jackson's] future employers." (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- "Mr. Corcoran's constant request that I pay his fees due to frivolous filings is also creating a tremendous amount of stress making it difficult for me to do my job at times as

well getting a good nights sleep." (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Complainant was unable to perform discovery on his SNE Transportation case because he was afraid that counsel for Respondent would re-depose him, find out who his current employer was, and get him fired again. "Mr. Corcoran would swear on a stack of bibles he had nothing to do with it or his client Randy Smedema." (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Complainant did not file a frivolous case out of ill will or to harass and intimidate employer. (CX 4). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- The truck Jackson was assigned did not have a coaxial cable so he could not hook up a CB radio, and this was intended by Respondent as further harassment. (CX 3, Exhibit B). While Respondent stated that none of its trucks have CB radio hookups, it admitted that some do have antenna hookups. (CX 3, Exhibit C). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Complainant alleges that he was promised $20 per pay stop. (CX 3, Exhibit B). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Respondent was constantly in contact with his attorney, Edward A, Corcoran, as part of a "ruse to constructively discharge Rick Jackson" and to "manufacture a non-discriminatory reason for discharging [Jackson]." (CX 3). This constitutes argument and an unsupported allegation and is not relevant to the log falsification issue.

- Equally irrelevant is the fact that Jackson also alleges that he paid attorney Scott Schroeder over $2,000 in April and May 2006 for his assistance with discovery related to one of Jackson's filings. (RX 2); (CX 3, Exhibit G). This is not relevant to the log falsification issue.